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No. 79-1738

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

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Respondent seeks to avoid review of this case by arguing that there is no jurisdiction for the appeal, that there are disputed factual issues on the merits, and that a President simply should not be entitled to immunity from civil damages, at least on the allegations respondent levels in this case. None of these arguments undercuts the reasons previously provided for granting the petition.

1. a. Respondent's suggestion that the district court's order is not final for purpose of appeal under the collateral order doctrine—supposedly because the Court of Appeals for the District of Columbia Circuit has

"settled" the question as to a President's absolute immunity from civil damages—is frivolous. The decision in *Halperin, et al. v. Kissinger, et al.*, 606 F.2d 1192 (D.C. Cir. 1979), is now before this Court on the Solicitor General's petition for certiorari. (*Kissinger, et al. v. Halperin, et al.*, No. 79-880.) Until the Court acts on that petition, the issue is live, unsettled, and susceptible of collateral review. *See Helstoski v. Meanor*, No. 78-546 (June 18, 1979).

b. Respondent's argument that there are unresolved issues concerning the absolute immunity defense that render the order interlocutory is premised on a misquotation of the district court's decision. With regard to the absolute immunity defense, the district court stated:

> "Absolute immunity is not available either to defendant Nixon as a former President or to defendants Harlow and Butterfield. *Butz v. Economou*, 438 U.S. 478 (1978); *Halperin, et al. v. Kissinger, et al.*, 606 F.2d 1192 (D.C. Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3467 (Dec. 7, 1979)." (Cert. Pet., App. A, 2a.)

That ruling ended the district court's inquiry into the absolute immunity matter, and *nothing* further with respect to that defense remains to be resolved at a trial on the merits. Respondent's argument to the contrary rests on that portion of the district court's order pertaining to the defense of "qualified immunity." There the district court stated:

> "In order to establish qualified immunity, each defendant must show that he was acting 'within the outer perimeters' of his responsibilities, that any action taken was performed without malicious intent to deprive plaintiff of constitutional or other rights, and that it was reasonable to believe that any action taken was legal. [Citations

> omitted.] Genuine issues of fact remain as to the scope of each defendant's responsibilities, the objective reasonableness of any beliefs each may have had concerning the legality of his alleged conduct in the Fitzgerald matter, and the subjective good faith underlying such conduct." (Cert. Pet., App. A, 2a-3a.)

Because the district court's decision with regard to the absolute immunity defense is final, it is appealable, and must be so in order for the defense to have meaning.

2. Respondent argues that review at this point is inappropriate because the parties dispute the underlying factual contentions which he believes should be resolved at trial. To this end, respondent has gone to considerable lengths to advocate his view of the merits and to highlight certain factual disputes between the parties. The flaw in this approach is that the absolute immunity defense is one which is totally independent of the factual issues. As we pointed out in the petition, Mr. Fitzgerald vigorously contends that Mr. Nixon purposely and maliciously ordered that his employment be terminated and cites carefully selected portions of Mr. Nixon's tape recorded conversations following his press conference of January 31, 1973 to buttress his viewpoint. Petitioner, on the other hand, maintains that he did not order Mr. Fitzgerald's termination, that the tape recordings, when read in their entirety, demonstrate that his statements concerning Mr. Fitzgerald were the result of his confusion about events that occurred some three years earlier, and that far from firing Mr. Fitzgerald for testifying before Congress about an earlier administration's mismanagement, Mr. Nixon actually attempted to find him suitable employment within the White House Office itself. But whether petitioner's or respondent's view of the facts is correct or not is immaterial for

purposes of the absolute immunity defense. In granting the petition, there is no reason for this Court to resolve whether Mr. Nixon in fact fired Mr. Fitzgerald. The only question presented for the Court is whether a President can be required, in response to a complaint seeking money damages, to prove at a trial on the merits whether his conduct was proper. Deferring consideration of the absolute immunity issue until after a jury's verdict would add nothing to this Court's basis for considering that issue. It would, however, frustrate a principal purpose of the defense.

3. The third reason respondent advances for avoiding review now is simply that a President should not be entitled to absolute immunity from civil damages, at least on the facts he alleges occurred here. Respondent does not dispute the significance of the issue the petition presents; nor does he suggest that it is one unworthy of this Court's consideration. Instead, he describes this case as one involving a President's intentional violation of a criminal statute and, based upon that description, argues that absolute immunity from civil damages should not be available under those circumstances. These arguments, of course, go to the question of whether absolute immunity from civil damages should be available to the highest executive official in the United States and, if so, under what circumstances. They are not arguments justifying denial of the petition.[1]

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[1] In the same vein, respondent argues that the Court should not grant the petition because even if the Court concludes that petitioner is entitled to absolute immunity on the constitutional and common law claims, he would have to face a trial on the implied statutory causes of action. However, the petition raises the issue of absolute immunity in all three contexts. Consequently, a ruling in petitioner's favor on the issue presented would negate the need for trial altogether.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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